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No. 518

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

ARTHUR F. WILLIAMS,

Appellee,

v.

AIRCOOLED MOTORS, INC.,

Appellant.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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October Term, 1954

ARTHUR F. WILLIAMS,
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v.

AIRCOOLED MOTORS, INC.,
Appellant.

No.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

The appellant appeals from the judgment of the Court of Appeals of the State of New York, entered on July 14, 1954, affirming a judgment in favor of the appellee above-named, entered upon an order of the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Judicial Department which (1) reversed, on the law, an order of the County Court of Onondaga County, affirming without opinion a judgment of the Municipal Court of the City of Syracuse, New York, which had granted a motion for summary judgment in favor of the appellant above-named, and (2) granted summary judgment in favor of the appellee above-named.

The appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The opinion of the Court of Appeals is reported in 307 N. Y. 332, 121 N. E. 2d 251. The opinion of the Appellate Division, Fourth Judicial Department, is reported in 283 App. Div. 187, 127 N. Y. S. 2d 135. The Onondaga County Court did not write an opinion. The opinion of the Municipal Court of the City of Syracuse is not yet reported. Copies of the opinion of the Court of Appeals; of the unreported opinion of the Municipal Court; and of the judgment appealed from, are attached hereto in Appendix A, *infra,* pp. 13-20.

Jurisdiction

This action was brought by an inspector, employed by the appellant, to recover "overtime" amounting to 90 cents, claimed to be due under the provisions of § 226 of the Election Law of the State of New York, relating to time allowed employees to vote. The action is a test case which, despite the trifling sum involved, affects numerous employees working "overtime" in many states and directly concerns the paramountcy of federal jurisdiction in the field of overtime pay of employees subject to the Walsh-Healey Act and the Fair Labor Standards Act. The case involves questions both of federal jurisdiction and of state police power not present in *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U. S. 421.

The judgment of the Court of Appeals was rendered and entered on July 14, 1954. A motion for reargument was made by the appellant on the opening day of the next term of the Court, which was denied by an order made and entered on October 7, 1954. By the same order the re-

mittitur was amended to show the presentation of the issues involved under the Constitution of the United States and the action of the Court of Appeals thereon. (See 307 N. Y. 841, 122 N. E. 2d 333.)

The notice of appeal to the Supreme Court of the United States was filed with the clerk of the Municipal Court of the City of Syracuse, that being the court possessed of the record, on November 8, 1954.

The jurisdiction of the Supreme Court to review this judgment by appeal is conferred by Title 28, United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the said judgment. *R. F. C.* v. *Beaver County,* 328 U. S. 204; *Winters* v. *New York,* 333 U. S. 507; *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282.

Statute Involved

Section 226 of the Election Law of New York State (L. 1949, ch. 100, p. 238) is set forth in Appendix B, *infra,* p. 21.

For convenience we have set forth in Appendix C the text of portions of the Walsh-Healey Act, the Fair Labor Standards Act, and the Fair Labor Standards Amendments of 1949, together with a few of many relevant rules and administrative interpretations thereunder, showing federal occupation of the field of "overtime" compensation of subject employees, and the conflict between those Acts and the New York enactment as construed and applied. We have also included in Appendix C certain statutory text and an administrative order constituting the basis for issuance of federal rulings and interpretations of the said Acts and regulations.

Questions Presented

The following questions are presented by this appeal:

1. Whether § 226 of the Election Law of the State of New York, as here construed and applied, conflicts with the Walsh-Healey Act and the Fair Labor Standards Act, or either of them (and the administrative regulations, interpretations, and rulings issued thereunder), in violation of the supremacy clause (article VI, clause 2) of the Constitution of the United States or in violation of the due process clause of the Fourteenth Amendment to the said Constitution, to the detriment of the appellant.

2. Whether the Walsh-Healey Act, the Fair Labor Standards Act of 1938, and other federal statutes such as the Portal-to-Portal Act of 1947 and the Fair Labor Standards Amendments of 1949—together with the administrative regulations, interpretations, and rulings issued thereunder—have occupied the field of regulation of the wages of subject employees in respect of their hours of work, and of the conditions and circumstances relative to their "overtime" and "premium" pay, so that § 226 of the Election Law of the State of New York, as here construed and applied, invades said field in violation of the supremacy clause (article VI, clause 2) of the Constitution of the United States or in violation of the due process clause of the Fourteenth Amendment to the said Constitution, to the detriment of the appellant.

3. Whether § 226 of the Election Law of the State of New York, as here construed and applied so as to require the appellant to pay to the appellee, in addition to a sum equal to twice his hourly rate of pay, another sum equal to

one-half his hourly rate of pay, deprives the appellant of its property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

Statement

Arthur F. Williams, an hourly employee of Aircooled Motors, Inc., at its plant near Syracuse, New York, brought action on February 6, 1953, against Aircooled in the Municipal Court of that City to recover "overtime" amounting to 90 cents, assertedly due under § 226 of the state Election Law relating to time allowed employees to vote. This statute (see full text in Appendix B, *infra,* p. 21) permits an employee to absent himself on Election Day for a period of two hours, and further provides that "no deduction shall be made from the usual salary or wages of such voter, and no other penalty shall be imposed upon him by his employer by reason of such absence."

For about 18 months prior to Election Day on November 4, 1952, Aircooled had been operating its factory on a 9-hour schedule on each of the first five days of the week, Monday through Friday. On the said Election Day the plaintiff Williams worked 7 hours and, in addition to his pay therefor (seven times $1.80 per hour), received $3.60, the latter sum representing twice his hourly rate of pay for the two hours of absence required by § 226 of the Election Law. Williams, however, subsequently filed suit for 90 cents more—being one-half of his hourly rate—which he claimed he would have earned as overtime if he had worked 9 hours. Aircooled, a manufacturer of aircraft engines, is subject to both the Walsh-Healey Act (requiring time-and-one-half for work after 8 hours of previous work dur-

ing a workday) and the Fair Labor Standards Act (requiring time-and-one-half for work after 40 hours of previous work during a workweek).

The answer of Aircooled set forth *inter alia* an affirmative defense challenging the validity under the Federal Constitution of the pertinent portion of § 226 if interpreted in accordance with the plaintiff's theory. On motion by Aircooled the Municipal Court granted summary judgment in its favor on March 16, 1953. That Court, interpreting the statutory term "usual wages" as meaning a sum equal to Williams' straight-time hourly rate of pay, did not reach the constitutional issues.

The Onondaga County Court affirmed, without opinion, on July 10, 1953.

On further appeal to the Appellate Division, Fourth Department, the Court reversed and granted summary judgment in favor of Williams on January 6, 1954. The Appellate Division, rejecting Aircooled's interpretation of the statute and therefore necessarily reaching the constitutional issues, sustained the validity of the statute, citing at the close of its opinion *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, and *People* v. *Ford Motor Co.*, 271 App. Div. 141.

Aircooled thereupon appealed to the Court of Appeals, which affirmed the judgment of the Appellate Division. The Court of Appeals held that the term "usual wages" in § 226 of the Election Law means the identical amount that Williams, an hourly worker, would have received if he had worked 9 instead of 7 hours on Election Day. Passing upon the constitutional issues advanced by the appellant, the Court of Appeals cited the two cases aforementioned and sustained the statute. The judgment of the Court of

Appeals was entered on July 14, 1954, immediately prior to the summer adjournment. On the opening day of the fall term, Aircooled moved for reargument, which motion was denied by the Court of Appeals on October 7, 1954. In the same order the Court amended the remittitur by adding the following:

> "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz., whether section 226 of the Election Law, as here construed and applied, violated article VI, clause 2, of said Constitution or deprived defendant of its property without due process in violation of the Fourteenth Amendment to said Constitution. The Court of Appeals held that the Election Law provision, as here construed and applied, was not violative of any of the above provisions of the Constitution of the United States."

On November 8, 1954, Aircooled filed with the clerk of the Municipal Court of Syracuse a notice of appeal to the Supreme Court of the United States on the constitutional questions recited in the quoted amendment to the remittitur.

The Questions Are Substantial

The issues raised in this appeal were not present in *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, or in *People* v. *Ford Motor Co.*, 271 App. Div. 141. Neither of those cases related to overtime, and neither of them involved any question of conflict with federal legislation or invasion of a field pre-empted by Congress.

We believe that the interpretation and application of the statute (L. 1949, ch. 100, see Appendix B, *infra*, p. 21)

by the Court of Appeals constitutes an invasion of an important field occupied by Congress, namely the field of overtime compensation of employees subject to the Walsh-Healey Act and the Fair Labor Standards Act. Moreover, a direct conflict, bound to recur on every future Election Day, now exists between the New York enactment, as construed and applied, and the federal statutes, thereby constituting a violation of the supremacy clause of the Constitution and consequently depriving the appellant of its property without due process of law. (*Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 272, 277.) Finally, we believe that to compel the payment of "overtime", in addition to straight time, for these unworked hours is shockingly unfair and exceeds the police power, broad though it is.

Twenty-seven states have legislation premitting employees to take time off to vote on Election Day.[1] At least 17 of these states forbid, in varying language, any wage deduction.[2] Six of these states, including New York, use the term "usual wages."[3] Therefore, the constitutional issues present in this appeal have far-reaching effect.

The conflict between the New York statute, as construed and applied, and the Walsh-Healey Act and Fair Labor Standards Act is illustrated in this appeal as follows:

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[1]Alabama, Arizona, Arkansas, California, Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin, and Wyoming.

[2]Arizona, California, Colorado, Illinois, Iowa, Kansas, Minnesota, Missouri, Nebraska, New Mexico, New York, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming.

[3]Arizona, Colorado, Nebraska, New York, South Dakota, and West Virginia.

Federal authority has ruled that the 2 hours off on Election Day are *not to be counted* as time worked in totaling previous or subsequent hours of work to arrive at the moment when daily or weekly overtime pay begins. This was specifically passed upon by the Deputy Administrator of the Wage and Hour and Public Contracts Divisions[4] on November 8, 1944 (see Appendix C, *infra*, pp. 26-27). The same principle was thereafter adopted in statutory form in 1949 as an amendment to Sec. 7 of the Fair Labor Standards Act. Sec. 7 (d)(2) of that Act provides that payments made for occasional periods when no work is performed are to be excluded from the term "regular rate." (See Appendix C, *infra*, p. 25, and regulations issued thereunder, *infra*, pp. 27-29.) On April 3, 1951 the Wage and Hour Administrator rendered his opinion that the said amendment to the Fair Labor Standards Act covers absences from work for the purpose of voting, and hence that payments for such purpose may be excluded from the "regular rate" in computing overtime compensation. (See Appendix C, *infra*, p. 30.)

The Court of Appeals, on the other hand, has construed and applied § 226 of the New York Election Law to say

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[4]These two Divisions, separately administering the Fair Labor Standards Act and the Walsh-Healey Act (Public Contracts Act) were consolidated in 1942 by an Administrative Order of the Secretary of Labor. By the same Order the power to issue rulings and interpretations with respect to the Walsh-Healey Act and regulations thereunder was delegated to the single Administrator of the consolidated Divisions. (See Sec. 4 of Walsh-Healey Act, Appendix C, *infra*, p. 22; see also Administrative Order of August 30, 1942 in Appendix C, *infra*, pp. 22-24.) Sec. 16 of the Fair Labor Standards Act, as amended in 1949, confirmed all orders, regulations, and interpretations of the Administrator of the Wage and Hour Division or of the Secretary of Labor then in effect under the Fair Labor Standards Act, except as inconsistent with the 1949 amendments to the Act. (See Appendix C, *infra*, pp. 25-26.)

that an hourly employee, who has customarily worked 9 hours on other days, must receive on Election Day, in addition to straight-time pay for the unworked 8th and 9th hours, overtime pay for the 9th hour.

Thus, *Federal law* says to the employer: "You can always operate 7 (or 8) hours on Election Day without being required to pay any premium to an hourly employee. The voting time is not to be counted under any circumstances."

But *New York law* says to the employer: "Where on other days you customarily operate 9 hours, you cannot operate on Election Day beyond 6 hours unless you pay overtime compensation since, if you operate a 7th hour, then the 2 unworked hours will be counted to make a total of 9 hours, and you must pay a premium for the 9th hour."

The conflict between state and federal law is again strikingly revealed if we were to assume that an hourly employee was tardy on Election Day and that he worked for only 3 hours prior to his release for the 2-hour voting period at the end of the shift. Under the interpretation of the Court of Appeals the employee would be entitled to receive what he would have earned if he had worked during the 2-hour voting period. It is obvious that he would have received, if he had worked, straight-time pay for those 2 hours inasmuch as he worked for only 3 hours previously. But, says the Court of Appeals, if he had worked 7 instead of 3 hours previously, he must be paid a premium for the 9th hour. *To arrive at the foregoing conclusions it is necessary to count the hours of actual work and then to tack on and count the 2 unworked hours. This procedure directly conflicts with the federal statutes and regulations in the field, which legislation and rules do not require unworked voting time to be counted in arriving at the point when an employer must begin to pay at the overtime rate.*

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Although the present test case involves a trifling sum, the principles involved are basic and of great importance to employers and employees in many states; in large establishments the cost would frequently run into many thousands of dollars. In *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, this Court pointed out at page 423 that state enactments in the business-labor field, such as the voting-time law of Missouri, are valid only "so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided." We believe that such a conflict exists in the present appeal and that the New York statute, as construed and applied, invades the field of overtime compensation which has been extensively and elaborately occupied by federal legislation and regulation insofar as concerns employees who work on government contracts or who are engaged in interstate commerce or in the production of goods for interstate commerce. (*Bethlehem Co.* v. *State Board*, 330 U. S. 767; *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 236; *Castle* v. *Hayes Freight Lines, Inc.*, U. S. Supreme Court, December 6, 1954.)

Respectfully submitted,

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APPENDIX A

Opinion of Court of Appeals

(307 N. Y. 332, 121 N. E. 2d 251)

COURT OF APPEALS OF
THE STATE OF NEW YORK

ARTHUR F. WILLIAMS,
Plaintiff-Respondent,

v.

AIRCOOLED MOTORS, INC.,
Defendant-Appellant.

FULD, J. This appeal involves the effect of overtime work rates upon the Election Law provision guaranteeing an employee the right to vote at an election without deduction being made from his "usual salary or wages."

In November of 1952, plaintiff was employed by defendant as an inspector in its factory. As a result of the operative collective bargaining agreement between the employer and the union of which plaintiff was a member, he was entitled to $1.80 an hour for straight time and time and a half, $2.70 an hour, for all work in excess of eight hours a day or forty hours a week. On the week in question, which included Election Day, and ever since May of 1951, the established workday at defendant's plant was nine hours a day and five days a week—which meant that plaintiff earned $17.10 a day and $85.50 a week. Informed by plaintiff that he planned to absent himself on Election Day in order to vote at the polls, defendant designated, as it was privileged to do, the two hours immediately following plaintiff's performance of seven hours of work.

Accordingly, plaintiff, after working seven hours, left the plant to cast his vote and did not return that day. He received as compensation $16.20, instead of the $17.10 which he ordinarily received for nine hours spent on the job. The smaller figure (of $16.20) was arrived at by paying him at the rate of $1.80 an hour, not only for the seven hours actually worked, but for the two additional voting hours as well.

It is plaintiff's claim that he should have received an additional ninety cents, representing time and a half for the hour in excess of eight, and it was for that amount, ninety cents, that he brought suit in the Municipal Court of the City of Syracuse. Upon defendant's motion, that court granted summary judgment dismissing the complaint. The County Court of Onondaga County affirmed, but, on a further appeal, the Appellate Division reversed and granted summary judgment in favor of plaintiff and thereafter granted defendant's motion for leave to appeal to us.

Insofar as relevant, section 226 of the Election Law, after reciting that "Any person entitled to vote at an election shall on * * * [Election Day] be entitled to absent himself" from his employment for two successive hours while the polls are open, provides that "no deduction shall be made from the usual salary or wages of such voter, and no other penalty shall be imposed upon him by his employer by reason of such absence."

The purpose of such a provision is "to eliminate any penalty for exercising the right of suffrage and to remove a practical obstacle to getting out the vote." (*Day-Brite Lighting, Inc.*, v. *Missouri*, 342 U. S. 421, 424.) Section 226 simply guarantees the employee against any loss of compensation by reason of his taking time off to vote. And, relating it to this case, it assures him that, if he works for seven hours and takes off the two hours allowed him to vote, he will be paid the amount he would have received—his

"usual salary or wages"—had he not voted and had he remained at his employment for his accustomed full nine hours.

It is defendant's contention, however, that the statute entitles plaintiff only to his usual hourly *rate* of wages—straight time as distinguished from overtime—for the hours taken off to vote. To read the statute in such a way would discriminate against all workers employed at an hourly rate rather than by the day or week and would penalize plaintiff the sum of ninety cents, the difference between straight time and overtime, because he chose to exercise his elective franchise. That could never have been the legislative intent or design, and we perceive no constitutional blight or infirmity if the statute be construed as we have here applied it. (Cf. *Day-Brite Lighting, Inc.*, v. *Missouri, supra*, 342 U. S. 421; *People* v. *Ford Motor Co.*, 271 App. Div. 141.)

The order should be affirmed, with costs.

LEWIS, Ch. J., CONWAY, DESMOND, DYE, FROESSEL and VAN VOORHIS, JJ., concur.

Judgment affirmed.

Appendix A

Opinion of Municipal Court of the City of Syracuse

(Not yet reported)

MUNICIPAL COURT OF
THE CITY OF SYRACUSE

ARTHUR F. WILLIAMS,
Plaintiff,

v.

AIRCOOLED MOTORS, INC.,
Defendant.

FARRELL, J. Motion by defendant for summary judgment under Rule 113 of the Rules of Civil Practice.

Section 226 of the Election Law refers to a person entitled to vote. It does not appear from the pleadings in this action as to whether the plaintiff was a duly registered voter entitled to vote, and since the question has not been raised by the parties hereto the Court must assume that he was a duly registered voter entitled to vote at the election in November, 1952.

I have read most of the cases cited by counsel for both parties in their memorandums filed with the Court, and also the other data on references set forth in the said memorandums. I have also made quite a detailed study of Title 29—Labor, Chapter V, Wage and Hour Division, Department of Labor, Section 778.0 to 778.27 contained in Federal Register—15 February 1950, and have arrived at the same conclusion as the Wage and Hour Administrator in his ruling in November, 1944 wherein he states,

"the minimum wage and overtime requirements of both Acts relate only to compensation for hours worked. Neither Act requires that time during which an employee is relieved of his duties for the purpose of voting be counted as time worked in computing minimum wages or overtime compensation due. . . .

"Under the principles stated in the Division's Releases R-1625 and R-1943, where an employee employed at an hourly rate is paid at that rate for time off which is allowed him for voting purposes, the amount so paid is not considered as compensation for hours worked and need not be included in computing the employee's regular rate of pay on which overtime compensation is calculated."

Similarly, as pointed out in Paragraph 7 of Interpretative Bulletin Number Four:

"Payments made for hours not worked are not compensation for overtime work and may not be credited or offset against overtime compensation due for overtime hours worked during the work week."

Contract between the defendant and the union states as follows: "The Company will comply with the requirements of the New York State Election Law in allowing time off with pay to vote." No reference is made to overtime, although there are several other provisions in the contract which refer to situations in which an employee may have time off. Reference is made to Article VI, Paragraphs 7 and 10. Article IX of said agreement entitled "Hours, Overtime, and Premium Pay", Paragraphs 3, 4, 5, 6, 7 and 12 each commences with the wording "Work by an employee". Article X, Paragraph 1, states "During such

period he shall perform such available work as may be assigned to him." The Court takes notice that Article XIX, Paragraph 8, defines straight time earnings as used in this article which article refers to vacation as follows: "includes and is limited to the gross earnings of an employee at his straight-time rate during straight-time and any overtime hours worked by him." This appears to be the only place in which such wording is used in the contract. Section 778.7 of the above-mentioned Title 29 states:

> "However, since payments are not compensation for work, no part of such payments can be credited toward overtime compensation due under the Act."

Section 778.7 entitled "Payments Not for Hours Worked" Paragraph 2 (f) states "as a general rule 'hours worked' will include all time in which an employee is required to be on duty or to be on the employer's premises or at a prescribed work place."

It is the Court's opinion that the defendant made no deduction from the usual salary of the plaintiff for November 4, 1952 as referred to in Section 226 of the Election Law of the State of New York.

Defendant's motion granted.

Appendix A

Judgment Appealed From

(Court of Appeals, July 14, 1954)

COURT OF APPEALS OF
THE STATE OF NEW YORK

ARTHUR F. WILLIAMS,
Respondent,

vs.

AIRCOOLED MOTORS, INC.,
Appellant.

BE IT REMEMBERED, That on the 19th day of March in the year of our Lord one thousand nine hundred and fifty-four, Aircooled Motors, Inc., the appellant in this cause, came here unto the Court of Appeals, by Fraser Brothers, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department. And Arthur F. Williams, the respondent in said cause, afterwards appeared in said Court of Appeals by Richard T. Mosher, his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Henry S. Fraser, of counsel for the appellant, and by Mr. Richard T. Mosher, of counsel for the respondent, and a brief also having been filed on behalf of the Attorney General of the State of New York, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme

Court appealed from herein be and the same hereby is affirmed, with costs. And thereafter, this Court, having denied a motion for reargument and granted a motion to amend this remittitur, did order that there be added hereto the following: Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz., whether section 226 of the Election Law, as here construed and applied, violated article VI, clause 2, of said Constitution or deprived defendant of its property without due process in violation of the Fourteenth Amendment to said Constitution. The Court of Appeals held that the Election Law provision, as here construed and applied, was not violative of any of the above provisions of the Constitution of the United States.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Municipal Court of the City of Syracuse, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, with costs, &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Municipal Court of the City of Syracuse, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Municipal Court, before the Judges thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
Albany, July 14, 1954.

APPENDIX B

Election Law of New York State, § 226
(L. 1949, ch. 100)

§ 226. Time allowed employees to vote. Any person entitled to vote at an election shall on the day of election be entitled to absent himself from any service or employment in which he is then engaged or employed, for a period of two hours, while the polls of the election are open; provided, however, that this section shall not apply to a voter on the day of a primary election if there be two successive hours, while the polls of such election are open, in which he is not in the service of an employer. If the voter shall notify his employer before the day of election of such intended absence, and if thereupon two successive hours for such absence shall be designated by the employer, and such absence shall be during such designated hours, or if the employer upon the day of such notice makes no designation, and such absence shall be during any two successive hours while the polls are open, no deduction shall be made from the usual salary or wages of such voter, and no other penalty shall be imposed upon him by his employer by reason of such absence. This section shall be deemed to include all employees of the state and all of the civil divisions thereof including cities, towns, and villages.

APPENDIX C

Walsh-Healey Act

(49 Stat. 2036)

Be it enacted . . . That in any contract made and entered into by any executive department . . . of the United States . . . for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations: * * *

(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week; * * *

SEC. 4. . . . The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act.

Administrative Order of Secretary of Labor Consolidating Wage and Hour and Public Contracts Divisions

(Administrative Order of Frances Perkins, Secretary of Labor, August 30, 1942, consolidating Wage and Hour and Public Contracts Divisions, effective October 15, 1942, and delegating certain duties and functions under Walsh-Healey Act [Public Contracts Act]. Published in *Wage and Hour Manual,* 1943 edition, Bureau of National Affairs, Inc., Washington, D. C., pp. 326-327.)

By virtue of and pursuant to the authority vested in me by R. S. section 161 (U. S. C., Ti. 5, section 22) and by

section 4 of the Public Contracts Act of June 30, 1936 (49 Stat. 2036), it is hereby ordered:

1. The duties and functions of the Division of Public Contracts and its personnel are combined and consolidated with those of the Wage and Hour Division, pursuant to the Plan and Budget which have been prepared under my direction, and which are made a part of this Administrative Order.

2. For departmental and operating purposes these two Divisions shall be treated as a consolidated Division under the name of the Wage and Hour and Public Contracts Divisions, under the direction of the Administrator of the Wage and Hour and Public Contracts Divisions. * * *

4. The following duties and functions of the Secretary of Labor under the Public Contracts Act are delegated to the Administrator of the Wage and Hour and Public Contracts Divisions: * * *

(3) To issue rulings and interpretations, on the advice of the Solicitor, with respect to the Act and regulations thereunder; to authorize and institute investigations and to prosecute any inquiry with respect to charges of violations of the Act; to conduct hearings and issue orders to compel the attendance and testimony of witnesses or the production of documents or to apply for such an order from a court; and to make findings of fact and decisions necessary to carry out the provisions of this Act. * * *

(5) To make recommendations to the Secretary for the issuance, amendment or rescission of such rules and regulations as he may deem to be necessary to carry out the provisions of the Act.

Action necessary to effect the consolidation of functions shall be instituted immediately in order that it may be completed not later than October 15, 1942.

Regulations 504, Sec. 201.103

(Issued by Secretary of Labor under Walsh-Healey Act. [Code of Federal Regulations, Title 41—Public Contracts, Chapter II—Division of Public Contracts, Part 201.])

SEC. 201.103. *Overtime.*—(*a*) Employees engaged in, or connected with the manufacture, fabrication, assembling, handling, supervision, or shipment of materials, supplies, articles, or equipment used in the performance of the contract may be employed in excess of 8 hours in any one day or in excess of 40 hours in any one week, Provided such persons shall be paid for any hours in excess of such limits the overtime rate of pay which has been set therefor by the Secretary of Labor.

(*b*) Until otherwise set by the Secretary of Labor the rate of pay for such overtime shall be one and one-half times the basic hourly rate received by the employee. The "basic hourly rate" means an hourly rate equivalent to the rate upon which time-and-one-half overtime compensation may be computed and paid under section 7 of the Fair Labor Standards Act of 1938, as amended. The basic hourly rate may, in no case, be less than the applicable minimum wage.

(*c*) If in any one week or part thereof an employee is engaged in work covered by the contractor's stipulations, his overtime shall be computed after 8 hours in any one day or after 40 hours in any one week during which no single daily total of employment may be in excess of 8 hours without payment of the overtime rate.

Appendix C

Fair Labor Standards Act of 1938

(52 Stat. 1060, as amended by 63 Stat. 910)

SEC. 7. (a) Except as otherwise provided for in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed. * * *

(d) As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include— * * *

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment; * * *

SEC. 16. * * *

(c) Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pur-

suant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act.

Ruling of Deputy Administrator, Wage and Hour and Public Contracts Divisions

(Ruling of William R. McComb, Deputy Administrator of the Wage and Hour and Public Contracts Divisions, November 8, 1944. [Labor Law Reporter, 1944, ¶ 33,061. Published by Commerce Clearing House, Inc.])

The minimum wage and overtime requirements of both acts [Fair Labor Standards and Walsh-Healey Acts] relate only to compensation for hours worked. Neither act requires that time during which an employee is relieved of his duties for the purpose of voting be counted as time worked in computing minimum wages or overtime compensation due. On the other hand, nothing in either act would prevent an employer from paying for time during which an employee is absent from work for voting purposes.

Under the principles stated in the Divisions' releases R-1625 and R-1943, where an employee employed at an hourly rate is paid at that rate for time off which is allowed him for voting purposes, the amount so paid is not considered as compensation for hours worked and need not be included in computing the employee's regular rate of pay on which overtime compensation is calculated. Similarly, as pointed out in paragraph 70(7) of Interpretative Bulletin No. 4, payments made for hours not worked are not compensation for overtime work and may not be credited or offset against overtime compensation due for overtime hours worked during the workweek. Where an employee is paid

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a fixed salary without regard to the number of hours worked, his salary constitutes straight time compensation for all the hours he is required to work in the salary period, whether he works only a few hours or many hours in that period. If such an employee is given time off to vote, it cannot be said that any part of his salary constitutes compensation for the hours not worked, and the regular rate of pay for overtime purposes should be computed in the usual manner by dividing the weekly salary by the number of hours actually worked in the workweek.

Interpretative Bulletin—Overtime Compensation

(Issued by Administrator of Wage and Hour Division, January 31, 1950. [Code of Federal Regulations, Title 29, Part 778—Labor, Chapter V—Wage and Hour Division, Department of Labor, Sections 778.0 to 778.27.])

Sec. 778.7 Payments Not for Hours Worked.—

(*a*) *The Statutory Provision.* Section 7(d)(2) [of the Fair Labor Standards Act, as amended in 1949 by 63 Stat. 910] provides that the term "regular rate" shall not be deemed to include:

> "payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment * * *."

However, since such payments are not compensation for work, no part of such payments can be credited toward overtime compensation due under the Act. * * *

(*c*) *Pay for Certain Idle Hours.* Payments which are made for occasional periods when the employee is not at work due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause, where the payments are in amounts approximately equivalent to the employee's normal earnings for a similar period of time, are not made as compensation for his hours of employment. Therefore, such payments are excluded from the regular rate of pay and, for the same reason, no part of such payments may be credited toward overtime compensation due under the Act.

This section deals with the type of absences which are infrequent or sporadic or unpredictable. It has no relation to regular "absences" such as lunch periods nor to regularly scheduled days of rest. Sundays may not be workdays in a particular plant, but this does not make them either "holidays" or "vacations," or days on which the employee is absent because of the failure of the employer to provide sufficient work. The term holiday is read in its ordinary usage to refer to those days customarily observed in the community in celebration of some historical or religious occasion; it does not refer to days of rest given to employees in lieu of or as an addition to compensation for working on other days.

The term "failure of the employer to provide sufficient work" is intended to refer to occasional, sporadically recurring situations where the employee would normally be working but for such a factor as machinery breakdown, failure of expected supplies to arrive, weather conditions affecting the ability of the employee to perform the work and similarly unpredictable obstacles beyond the control of the employer. The term does not include reduction in work sched-

ule, ordinary temporary lay-off situations or any type of routine, recurrent absence of the employee.

The term "other similar cause" refers to payments made for periods of absence due to factors *like* holidays, vacations, sickness and failure of the employer to provide work. Examples of "similar causes" are absences due to jury service, reporting to a draft board, attending a funeral of a family member, inability to reach the workplace because of weather conditions. Only absences of a non-routine character which are infrequent or sporadic or unpredictable are included in the "other similar cause" category. * * *

(*g*) *"Other Similar Payments"—General.* The preceding paragraphs of this section have enumerated and discussed the basic types of payments which are excluded from the regular rate under section 7 (d) (2) because they are not made as compensation for hours of work. Since a variety of miscellaneous payments are paid by an employer to an employee under peculiar circumstances, it was not considered feasible to attempt to list them. It is clear that the clause was not intended to permit the exclusion from the regular rate of payments such as bonuses or the furnishing of facilities like board and lodging which, though not directly attributable to any *particular* hours of work are, nevertheless, clearly understood to be compensation for services.

A few examples may serve to illustrate the type of payments intended to be excluded as "other similar payments":

Sums paid to an employee for the rental of his truck or car.

Loans or advances made by the employer to the employee.

The cost to the employer of conveniences, furnished to the employee such as parking space, restrooms, lockers, on-the-job medical care and recreational facilities.

Appendix C

Letter Opinion of Wage and Hour Administrator

(Letter Opinion of William R. McComb, Wage and Hour Administrator, April 3, 1951. [Labor Law Reporter, 1951, ¶ 29, 131. Published by Commerce Clearing House, Inc.])

This is in reply to your letter . . . , concerning payments to employees during absences from work for the purpose of voting. You ask if such payments may be excluded from the regular rate of pay in computing overtime compensation under section 7 (d) (2) of the Fair Labor Standards Act.

Although as you point out, this type of absence is not specifically mentioned in section 778.7 (c) of Part 778 [see *supra,* Appendix C, pp. 28-29], it is my opinion that such a payment may be considered to be an "other similar payment" within the meaning of section 7 (d) (2) and that it may be excluded from the regular rate of pay under this section.

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